

rule 2 of the Rules of the High Court 1980 by the plaintiff, I heard further arguments in open court on June 4, 1985 and confirmed the order I had made.

The facts of the case as far as this application was concerned were as follows. The plaintiff on October 26, 1979 purchased from Realty Development Corporation of Malaysia Sdn. Bhd. ("the Development Corporation") two apartments identified as apartment No. 10B-4 (5-10A) and apartment No. 9D-4(5-9A). On March 23, 1982 the plaintiff purported to purchase parking bay L. 17 from the Development Corporation. Marked over this parking bay were the figures "5-10A". On September 12, 1983 the plaintiff sold apartment No. 10B-4(5-10A) to the defendant by way of a deed of assignment. A letter dated May 4, 1984 from the Development Corporation (see Exh. LES-1, Encl. 3) confirmed that the plaintiff had purchased the parking bay separately from the two apartments she bought originally.

The plaintiff contended that she sold the apartment to the defendant independently of the parking bay but the defendant denied this and deposed that the plaintiff's agent had indicated to him prior to the sale that the parking bay "belonged to the said apartment" he was purchasing. This was a question of fact which could not be resolved by affidavit evidence. It was, however, the contention of counsel for the defendant that the parking bay formed part of common property and therefore could not be sold as a separate entity.

By consent of both counsel, the only issue I had to decide was whether the Development Corporation was in law permitted to sell a parking bay independently of an apartment. It was also agreed by both counsel that the provisions of the recently enacted Strata Titles Act 1985 which came into force on June 1, 1985 were to apply. In order to answer the agreed issue posed, I had to decide whether in the light of the provisions of the Act the sale of the parking bay as a separate entity by the Development Corporation, that is independently of either of the two apartments was valid or not. Counsel for the plaintiff whilst admitting that the parking bay was an accessory parcel contended that a sale and purchase agreement by its very nature conferred a right to the Development Corporation to sell the parking bay. I found this argument difficult to follow and took the view, having regard to the specific provisions of section 42 and section 69 of the Act, that the Development Corporation was not in law permitted to sell the par-

A king bay as a separate entity as it purported to do in this case.

B I was also of the view that, even if I was wrong in this conclusion as a matter of law, on a balance of convenience the *status quo* should remain until the trial of the suit for the following reasons.

C First, the photograph exhibited as 'CTO-1' to the defendant's affidavit clearly showed that the parking bay was reserved for apartment No. 10B-4 (5-10A). This fact was confirmed by page 2 of the document marked as 'CTO-2' from the Development Corporation exhibited to the same affidavit. Secondly, page 1 of the same document showed that the plaintiff who retained apartment No. 9D-4 (5-9A) was a "non-purchaser" of any parking bay in relation to that apartment. Thirdly, the plaintiff herself (see para. 7 of Encl. 3) admitted that the defendant had after the execution of the deed of assignment on September 12, 1983 been using parking bay L.17 obviously in the *bona fide* belief that the parking bay L.17 was appurtenant to his apartment No. 10B-4 (5-10A).

E *Application dismissed*

Solicitors: Azman, Davidson & Co.; A.K. Lee & Co.

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PUBLIC PROSECUTOR v. WEE MEE INDUSTRIES CO. SDN. BHD.

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[A. Cr. J. (Tan Chiaw Thong J.) November 9, 1985]

[Kuching – Criminal Appeal No. KG 2 of 1984]

H *Criminal Law and Procedure – False trade description – Halal – Hukum Syarak – Edible vegetable oil – Soup powder containing animal fat – Trade Descriptions (Use of Expression "Halal") Order, 1975 – Trade Descriptions Act, 1972, ss. 3(1)(a), 18 & 19.*

I *Trade Description – Food – False description "Edible Vegetable Oil" when in fact "animal fat" was one of ingredients – Trade Descriptions Act, 1972 (Act 87), ss. 3(1)(a), 18 & 19.*

In this case the respondent was charged (a) that he applied a false trade description to wit "halal" on packets of instant noodles whereas they were not; (b) that he applied a false trade description namely "Edible vegetable oil" on packets of instant noodles whereas in fact the soup powder contained animal fat and thereby committed offences under the Trade Descriptions Act, 1972.

The respondent was acquitted on the first charge and convicted on the second charge. The Public Prosecutor appealed against the order of acquittal and the respondent appealed against the conviction.

Held: (1) the expression "halal" was intended to be used in a technical sense as defined in the Trade Description (Use of Expression "Halal") Order, 1975. What the lower Court had to consider was whether the prosecution had succeeded in proving that by the use of the word "halal" as defined in the Order the accused had applied a false trade description;

(2) in this case the prosecution had not adduced evidence that the expression "Hukum Syarak" in relation to the expression "halal" applied to the State of Sarawak in the sense assigned to the former expression by the 1975 order. The lower court had not found that the witness called was an expert witness and in any event his evidence did not disclose that "Hukum Syarak" as defined applied to the State of Sarawak. The prosecution had not satisfied the lower Court as to how without evidence the lower court was competent to take judicial notice of the application of the Hukum Syarak as defined in the State. The appeal of the Public Prosecutor against acquittal of the respondent on the first charge must be dismissed;

(3) before the confirmation of the suspicion of the prosecution by the chemist report, it cannot be said that the necessary facts necessary to found a prosecution against the accused had in fact been discovered on May 14, 1980 when the goods were seized in the shop of the respondent because on that day it was not known whether in fact material facts existed which were necessary to found a prosecution against the respondent. The learned Magistrate did not err therefore when he found that the charge was not brought out of time, that is outside the time limit imposed by section 19 of the Trade Description Act 1972;

(4) the fair and reasonable conclusion to be drawn in the absence of any evidence to indicate that the Chemist was not doing his duties well is that on analysis he found the presence of animal fat in the flavouring powders sent for analysis in connection with the second charge. On this finding which was accepted by the lower Court, it could not be said that by omitting to include the words "animal fat" in the packets concerned, this was not a false trade description;

(5) the expression "material" in section 5 of the Trade Descriptions Act 1952 cannot and should not be viewed only in quantitative terms. It is obvious that in disclosing that part of the composition of an item of food contains edible vegetable oil without mentioning animal oil or fat when in fact such an item forms part of its composition and if such item of food is intended to be sold to all sections of the community including Muslims, such an omission would amount to false trade description to a material degree;

(6) the expression "material" in section 5 of the Act should not be confined to its being regarded in quantitative terms. The materiality or importance of a false trade description in relation to the goods, the subject matter of the charge should also be a relevant consideration.

Cases referred to:

- (1) *R. v. Brentford Justices, Ex parte Wong* [1981] Q.B. 445.

- A (2) *Davenport v. Appolinaris Company Ltd.* (1903) 89 L.T. 19.

CRIMINAL APPEAL.

- B *Abdul Rahman bin Sebeli* (Deputy Public Prosecutor) for the appellant.
W.T. Voon for the respondent.

Cur. Adv. Vult.

- C Tan Chiaw Thong J.: In the lower Court the accused was charged with the offences specified in the following two charges:

"1st Charge:

- D That you on May 14, 1980 at about 9.45 a.m. at Wee Mee Industries Co. Sdn. Bhd., Lot No. 1124, Bintawa Industrial Estate, Jalan Pending, Kuching, Sarawak, in the District of Kuching, First Division, in the State of Sarawak, in the course of business, did apply a false trade description to wit, 'Halal' on 15,074 packets of instant noodles, whereas the said expression 'Halal' used in relation to the said noodles was not "Halal" within the meaning assigned to it by the Trade Descriptions (Use of Expression 'Halal') Order, 1975 (gazetted as P.U. (A) 237 dated 7.8.1975) and that you have thereby committed an offence under section 3(1)(a) of the Trade Descriptions Act, 1972 and punishable under section 18 of the same Act. (Act 87).

2nd Charge:

- F That you on May 14, 1980, at about 9.45 a.m. at Wee Mee Industries Co. Sdn. Bhd., Lot No. 1124, Bintawa Industrial Estate, Jalan Pending, Kuching, in the District of Kuching, First Division, in the State of Sarawak, in the course of business, did apply a false trade description on 8338 cartons x 30 x 85 gm. Curry Flavour "Horlic" Brand Instant Noodles, namely EDIBLE VEGETABLE OIL was printed as one of the ingredients of the soup powder in respect of the said instant noodles manufactured by you, whereas in actual fact, the soup powder contained ANIMAL FAT and you have thereby contravened section 3(1)(a) of the Trade Descriptions Act, 1972 and punishable under section 18 of the same Act. (Act 87)."

- H He was acquitted on the first charge and convicted on the second charge. Against the order of acquittal on the first charge and conviction on the second charge, the Public Prosecutor and accused have respectively appealed to this Court.

- I The Public Prosecutor appeals on two grounds, the first of which in effect alleges that the learned trial Magistrate had misdirected himself in that, whereas he had found that in applying or affixing the word "Halal" on the packets of instant noodles specified in the first charge by the accused, it was a false trade description, it was not essential for him to have found that the expression "Halal" as

specified in the first charge did not come within the meaning assigned to it by the Trade Descriptions (Use of Expression "Halal") Order, 1975 and thereby acquitted the accused. It was submitted by the learned DPP that the learned Magistrate could resort to Article 3 of the 1975 Order to find out the meaning of the term "Halal" in relation to the Islamic religion without resorting to the definition of "Hukum Syarak" in Article 2. Further, that the lower Court should have taken cognizance that Islam is the official religion in this State. As to the first point, the first charge quite clearly charged the accused with having applied a false trade description, namely, "Halal", to the packets of instant noodles specified within the meaning assigned to that expression by the 1975 Order. It behoves, therefore, the prosecution to prove that what was alleged therein was a false trade description and this necessitates proving that the expression "Halal" in the first charge falls within the meaning assigned to that expression in the 1975 Order. The 1975 Order in Article 3 thereof clearly defines what the expression "Halal" means when used in relation to food in any form whatsoever in the course of trade or business or as part of a trade description applied to food. The expression "Hukum Syarak" was used in connection with such a definition and that expression is defined in Article 2 of the 1975 Order. As defined, "Hukum Syarak" means the Laws of Islam in the Mazhab Shafie or the Laws of Islam in any of the other Mazhabs of Maliki, Hambali or Hanafi which are approved by the Yang di-Pertuan Agong to be in force in the Federal Territory or the Ruler of any State to be in force in the State. In this connection, it was alleged in the second ground of appeal that the learned trial Magistrate had failed to interpret correctly the meaning of "Halal" in relation to "Hukum Syarak" and that he had failed to take judicial notice of the laws of the country, thereby rendering his judgment in acquitting the accused defective and unsatisfactory. As to the question of taking judicial notice of the laws of the country, the learned trial Magistrate quite clearly in his judgment more than once took judicial notice that Islam is the official religion of Malaysia including the State of Sarawak. That the expression "Halal" was intended to be used in a technical sense as defined in the 1975 Order is clear by the wording of the first charge. In my view, therefore, what the lower Court had to consider was whether the prosecution had succeeded in proving that by the use of the expression "Halal" as defined in the 1975 Order, the accused had applied a false trade description. In the lower Court the prosecution had not adduced evidence

A that the expression "Hukum Syarak" in relation to the expression "Halal" applied to the State of Sarawak in the sense assigned to the former expression by the 1975 Order. In this connection, the lower court had not found that P.W. 2 was an expert witness and in any event, his evidence did not disclose that "Hukum Syarak" as defined
B applied to the State of Sarawak. Further, the prosecution had not satisfied the lower Court as to how, without evidence, the lower Court was competent to take judicial notice of the application of the "Hukum Syarak" as defined in the
C State. Accordingly, I find that the first ground of appeal has no substance. Likewise for the same reasons, the second ground of appeal. Hence, the appeal of the Public Prosecutor against acquittal of the accused on the first charge is dismissed.

D I now come to the appeal of the accused against his conviction and sentence on the second charge. In this connection, learned counsel for the accused had, by not addressing the Court on the other grounds of appeal, abandoned them, with the exception of the first two grounds. Among the
E grounds abandoned is that relating to the severity of sentence. Since learned counsel for the accused has not addressed me on this ground, I do not propose to deal with it. Likewise the order of forfeiture made by the lower Court.

F The first ground of appeal states that the learned trial Magistrate erred in law and in fact when he found that the charge was not brought out of time. Learned counsel for the accused has submitted a written outline of his submission. It was submitted that the relevant day when P.W.1 discovered the commission of the offence by the
G accused was May 14, 1980 when he conducted a search on the premises of the accused and not when the results of the analysis of the chemist were made known by his report under section 92 of the Evidence Ordinance dated June 29, 1981 which was received by the prosecution on August
H 13, 1981. If the date relating to the discovery of the commission of the offence charged in the second charge is the former date, then quite clearly the prosecution would have been brought outside the time limit imposed under section 19 of the Trade Descriptions Act, 1972; but not if
I the relevant date is the latter date. In this connection, it was submitted by learned counsel for the accused that, on the analogy of an offence under the English Trade Descriptions Act, 1968 and 1972, the period of limitation commenced from the discovery of the material facts necessary to found a prosecution, and it was contended that

such discovery was made on May 14, 1980. In this connection, the case of *R. v Brentford Justices, ex parte Wong*⁽¹⁾ was cited. That case decided that a police officer cannot gain time by laying information while still researching material facts necessary to found a prosecution and without, at the time of laying such information, having decided to proceed. With respect, I do not consider that this case helps the accused because here, the prosecution only decided to prosecute the accused upon the receipt by them of the chemist report on August 13, 1981. Previous to that, the evidence indicates at most, that the prosecution had strong suspicion that the offence specified in the second charge had been committed by the accused. It is true that the chemist report (Exh. P7) confirmed the suspicion of the prosecution but in my view, before this confirmation, it cannot be said that the necessary facts necessary to found a prosecution against the accused had in fact been discovered by the prosecution on May 14, 1980 because on that day, it was not known whether, in fact, material facts existed which were necessary to found a prosecution against the accused. Accordingly, for the reasons given, I consider that the lower Court had not misdirected itself on the point and hence the first ground of appeal fails.

The second ground of appeal alleges that the learned trial Magistrate erred in law and in fact when he found that the addition of the words "Edible Vegetable Oil" was a false trade description. On this ground, it was contended by learned counsel for the accused that the chemist report (Exh. P7) merely states that in relation to each packet of "Horlic Curry Flavour" powder contained in each of the packets of noodles sent for analysis in connection with the second charge, there was found the presence of animal fat, and that it does not state that there was no edible vegetable oil present. Further, the amount of animal fat found was not stated and this may only be infinitesimal. In this connection, P.W.1 had confirmed that the articles sent for analysis were under Exh. D1, which was prepared by him. It is clear that under item (E)(3) of Exh. D1, a request was made to the chemist to analyse what materials were contained in the powders sent for analysis including what type of oil or fat was used in the powder; also to ascertain the type of animal oil or fat that was used. Reading this item of Exh. D1 with the chemist report (Exh. P7) itself, the fair and reasonable conclusion to be drawn in the absence of any evidence to indicate that the chemist was not performing his duties well is that, on analysis, he only found the presence of animal

A fat in the flavouring powders sent for analysis in connection with the second charge. Accordingly, the argument of learned counsel for the accused cannot be accepted.

B It was further contended that whether the description "edible vegetable oil" is a false trade description must be decided by the Court looking at the words on the packets of noodles as a whole and that, in this instance, the lower Court did not examine all the words on the packets of noodles but only looked at the words "edible vegetable oil".
C In this connection, reading the record of proceedings as a whole, including the judgment of the learned trial Magistrate, there is nothing to indicate that in arriving at his finding that the description "edible vegetable oil" was a false trade description, the learned trial Magistrate had omitted to look at the words under the heading "Soup" on the packets of noodles concerned. Be that as it may, what the lower Court, in my view, had to decide in relation to the second charge was whether, in applying the description "edible vegetable oil" to the packets of noodles specified in the second charge, this amounted to a false trade description. In this connection, as indicated above, considering Exh. D1 in the light of Exh. P7, the finding of the chemist was that he only found the presence of animal fat in the powder included in the packets of noodles. On this finding, which was accepted by the lower
D Court, it cannot, in my view, be said that by omitting to include the words "animal fat" in the packets concerned, this is not a false trade description. In this connection, it was submitted that, even if the trade description is false, it must be false to a material degree. Learned counsel
E for the accused has contended that the expression "material" here must mean a significant or substantial amount, but he has cited no authority to support this contention. The expression "material" used in section 5 of the 1972 Act has not been defined. But having regard to the scheme of the
F Act and the mischief against which section 3(1)(a) of that Act is intended to deal with, read in the light of section 5, I am inclined to the view that the expression "material" in section 5 cannot, and should not, be viewed only in quantitative terms. It is obvious that, for instance, in disclosing
G that part of the composition of an item of food contains edible vegetable oil without mentioning animal oil or fat when in fact such an item forms part of its composition, and if such item of food is intended for sale to all sections of the community including Muslims, such an omission in my view would amount to a false trade description to a
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material degree. The case of *Davenport v. Apollinaris Company Limited*⁽²⁾ was quoted by learned counsel for the accused, but I do not consider that this authority assists the accused. What the court had to decide in that case was whether the description "natural mineral water" applied to water, which had been subjected to a process for the purpose of making it fit for sale and consumption, which when offered for sale was in all essentials identical to the water as it existed in the spring from which it came, was a false trade description. Section 3 of the English Merchandise Marks Act, 1887 defines a false trade description as one which is false in a material respect as regards the goods to which it is applied. The English Court found that what was done did not amount to a false trade description. In his judgment, Channell J. mentioned at page 21 that the evidence appeared to be that water could not be preserved in the exact condition in which it was, and that it went through some process which preserved it as nearly as possible; that that was practically what the findings of the magistrate were, and the omission was an omission to state that it had gone through some processes for the purpose of preserving it as nearly as possible in its natural condition, the differences being, in the opinion of the magistrate, quite immaterial and unimportant. He came to the conclusion that the magistrate did not wrongly deal with the question that was before him. In this connection, it is pertinent to observe that, in considering whether the description amounted to a description which was false in a material respect, the learned judge considered the opinion of the magistrate that the omission to state that the water had gone through some processes for the purpose of preserving it as nearly as possible in its natural condition was quite immaterial and unimportant. I think that this is some support for my view that the expression "material" in section 5 of the 1972 Act should not be confined to its being regarded in quantitative terms. The materiality or importance of a false trade description in relation to the goods, the subject-matter of the charge, in my view, should also be a relevant consideration. As stated, viewed in this light, even if the contents of the animal fat found to be present on analysis were small in volume, it cannot be said that because of this a false trade description cannot be constituted thereby if the omission to state such an ingredient in the composition of the goods concerned is material or important in its composition.

For the reasons given, the second ground of appeal fails. Accordingly, the appeal of the accused

A against his conviction on the second charge is dismissed.

Order accordingly.

Solicitors: *Yong & Co.*

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ORIENTAL BANK BHD. v. ABDUL RAZAK ROUSE

[O.C.J. (Abu Mansor J.) November 5 & 18, 1985]

[Kota Kinabalu — Originating Summons No. 100 of 1984]

D *Legal Profession — Advocate and solicitor acting for both parties — Conflicting interests — Undertaking to bank to register charge — Breach of undertaking.*

Conveyancing — Charge against lands — Lawyer's promise to bank to register charge — Breach of undertaking.

E The plaintiffs applied, *inter alia*, for an order that the defendant, an advocate and solicitor, do within 14 days register a charge for the sum of M\$5 million in favour of the plaintiffs against two pieces of land in Kuala Lumpur. The plaintiffs granted a loan of M\$5 million to one Datu Haji Abdul Salam (the borrower) on or about February 2, 1982. The loan was to be secured by charges against Sabah and Kuala Lumpur lands. The defendant who acted as solicitor for the plaintiffs was instructed by the plaintiffs F to prepare and register the said charges. The charge against the Sabah lands but not the Kuala Lumpur lands was duly registered.

G On April 30, 1982, the defendant wrote a letter to the plaintiffs "to request for your kind approval to release a further sum of Malaysian Ringgit Six Hundred Thousand Only (M\$600,000) to enable us to redeem the charge on Dashrun Hotel Sdn. Bhd. properties held by Bank Bumiputra Malaysia Bhd. and to recharge the same in favour of your bank and also to settle some of the other creditors as stated in our client's application."

H On May 3, 1982 in response to the defendant's request, the plaintiffs duly credited the \$600,000 requested into the defendant's firm account. Despite this and the five reminders sent by the plaintiffs, the defendant failed to present the charge in respect of the Kuala Lumpur lands for registration.

I The defendant, who was also acting for the borrower, said, *inter alia*, that since he was acting for both parties he had the duty to protect both parties' interests in this matter. The defendant further said that since the plaintiffs had only released M\$3,837,500 out of the M\$5 million loan with a security valued at \$6.3 million (in Sabah lands) and whereas and on the other hand the borrower had to meet contractors' claims, he felt it was fair not to charge the Kuala Lumpur lands so that the borrower could use it to raise further funds from another bank.